

NOTICE

Decision filed 01/24/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 110401-U

NO. 5-11-0401

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

KEITH L. WILLIAMS,

Defendant-Appellant.

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Appeal from the
Circuit Court of
St. Clair County.

No. 94-CF-529

Honorable
John Baricevic,
Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Welch and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's successive petition for postconviction relief at the second stage.

¶ 2 Defendant, Keith L. Williams, appeals from an order of the circuit court of St. Clair County dismissing his successive petition for postconviction relief at the second stage. On appeal, defendant contends the circuit court erred in making findings of fact at the second stage of proceedings and asks us to vacate the circuit court's dismissal of his petition and remand the cause for an evidentiary hearing. We affirm.

¶ 3 **BACKGROUND**

¶ 4 After a jury trial that ended on August 9, 1995, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 1992)) in the shooting death of the victim, Gary Triplett, and was sentenced to 50 years in the Department of Corrections. Defendant testified he was not at the scene of the shooting. However, at the time of the shooting, several people

were inside the apartment where the victim died who identified defendant not only through a photographic line up, but also in-court identifications. Marcell Pfeiffer, who was eight years old at the time of the trial, Marcell's mother, Letisha Williams, and Marcell's father, Timothy Burch, all identified defendant as the shooter who followed the victim into their apartment and fired several shots at the victim, causing his death. Burch testified he knew defendant for three or four years prior to the shooting and considered him a friend.

¶ 5 On November 23, 1995, defendant filed a direct appeal from his conviction. This court affirmed defendant's conviction and remanded to the trial court regarding sentencing credit for time served prior to defendant's transfer to this state (*People v. Williams*, 293 Ill. App. 3d 1161, 718 N.E.2d 1100 (1997) (unpublished order pursuant to Supreme Court Rule 23)). On September 13, 1996, prior to the filing of a brief in the direct appeal, defendant filed a *pro se* petition for postconviction relief, alleging he was denied a fair trial due to unfair identification techniques. The petition was summarily dismissed with prejudice. This court reversed and remanded for further proceedings. *People v. Williams*, 308 Ill. App. 3d 567, 724 N.E.2d 230 (1999). On remand, the circuit court conducted an evidentiary hearing and denied the petition. On appeal, this court affirmed the circuit court's denial of defendant's amended petition for postconviction relief, finding that defendant was not denied effective assistance of counsel when his counsel failed to seek suppression of the photographic identifications and failed to call certain witnesses. *People v. Williams*, No. 5-00-0641 (2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On January 25, 2010, defendant filed this successive petition for postconviction relief *pro se* in which he alleged that the State committed a discovery violation when it did not tender all of the crime scene photos to the defense prior to trial. According to defendant, the photos show that Burch and Pfeiffer could not have seen the shooter from where they claimed they were standing. The photos also show Burch lied when he said the shooter

looked at him, fired a shot into the apartment door, and left, because the photos do not show a bullet in the door. The photos further show Letisha Williams lied when she said the photos accurately depicted her apartment at the time of the shooting. Defendant also claimed that defense counsel was ineffective for failing to use the available photos to support defendant's innocence. Defendant attached affidavits of his mother, sister, brother, and Mark Booker, who all claim that defendant could not have committed the murder.

¶ 7 After more than 90 days passed without the circuit court taking any action on the successive petition, the circuit court appointed counsel to represent defendant. On January 5, 2011, postconviction counsel filed a request for the production of color copies of the crime scene. On January 12, 2011, defendant acting *pro se* filed the same request for photos. At a hearing held on March 28, 2011, defendant dismissed postconviction counsel and chose to proceed *pro se*. In response to defendant's request for discovery, the State sent defendant black-and-white photographs of the crime scene in its possession. At a hearing on May 16, 2011, the circuit court allowed defendant to look at the original color photographs.

¶ 8 On June 8, 2011, defendant filed a motion for leave of the court to file a successive amended petition for postconviction relief and attached an amended petition advancing a claim of actual innocence. In his amended petition, defendant asserted *inter alia* that (1) the crime scene photographs were deliberately withheld and would have exonerated him if they had been introduced at trial and (2) certain facts elicited at trial proved that Timothy Burch, Letisha Williams, and Marcell Pfeiffer would not have been able to identify him as the shooter. Defendant alleged the photographic issue could not have been raised in an earlier proceeding because he did not have access to the photos until the trial court's May 16, 2011, order. Defendant again attached the affidavits of his mother, sister, brother, and Mark Booker. In response, the State filed a motion to deny defendant's motion for leave of court to file a successive petition for postconviction relief or, in the alternative, a motion to dismiss

defendant's amended petition for postconviction relief.

¶ 9 After a hearing, the circuit court granted defendant's motion for leave to file a successive postconviction petition, but dismissed defendant's amended petition for postconviction relief. The circuit court examined the photographs and found that the crime scene photographs failed to support a claim of actual innocence, but instead corroborated the trial testimony of the State's witnesses. The circuit court found that all other issues defendant was attempting to raise were barred by collateral estoppel, *res judicata*, waiver, or forfeiture, and that claims alleging ineffective assistance of appellate counsel were meritless. The trial court concluded that the affidavits attached to the petitions were not newly discovered evidence as Booker's affidavit was from 1995, the year of the trial, and the affidavits of defendant's family members were consistent with their testimony at trial. Defendant now appeals.

¶ 10 ANALYSIS

¶ 11 In this appeal, defendant contends the circuit court erred in making findings of fact at the second stage of his successive postconviction proceedings without the benefit of an evidentiary hearing. Defendant insists the circuit court overstepped its authority by examining the photographs and finding they did not prove his innocence. Defendant asks us to vacate the circuit court's dismissal of his postconviction petition and remand for an evidentiary hearing. We disagree.

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) provides a method by which a person under criminal sentence can assert that his or her conviction was the result of a substantial denial of his or her rights under the United States Constitution or the Illinois Constitution or both. A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605, 903 N.E.2d 437, 444 (2009)

(quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328, 637 N.E.2d 1015, 1017 (1994)). Therefore, the Act contemplates the filing of only one postconviction petition, and obtaining leave of the court is a condition precedent to the filing of a successive postconviction petition. *Simmons*, 388 Ill. App. 3d at 605, 903 N.E.2d at 444-45; see also 725 ILCS 5/122-1(f) (West 2008).

¶ 13 Pursuant to section 122-1(f) of the Act, leave of the court may be granted only if a defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post[]conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2008). To establish cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2008); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 460, 793 N.E.2d 609, 620 (2002). To establish prejudice, a defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2008); see also *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624.

¶ 14 However, a defendant need not establish cause and prejudice if he can show a valid claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330-31, 919 N.E.2d 941, 947 (2009). In order to win relief under this theory, the evidence adduced by the defendant and showing his actual innocence must be newly discovered evidence, meaning (1) it was not available at the defendant's original trial and (2) it could not have been discovered sooner. *Simmons*, 388 Ill. App. 3d at 614, 903 N.E.2d at 451.

¶ 15 A postconviction proceeding involves three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). At the first stage, the circuit court must, within 90 days of filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. *Edwards*, 197 Ill. 2d

at 244, 757 N.E.2d at 445; 725 ILCS 5/122-2.1(a)(2) (West 2008). If the court does not dismiss the petition as either frivolous or patently without merit, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2008)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2008)). *Edwards*, 197 Ill. 2d at 245-46, 757 N.E.2d at 446.

¶ 16 At the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446 (citing *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998)). If no such showing is made, the petition is dismissed. If, however, a substantial showing of a constitutional violation is set forth, the petition advances to the third stage, where the circuit court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446.

¶ 17 In the instant case, the circuit court dismissed defendant's *pro se* petition at the second stage prior to an evidentiary hearing. The relevant question in this case, therefore, is whether defendant's petition makes a substantial showing of a constitutional violation. Review of a circuit court's dismissal of a defendant's postconviction petition is *de novo*. This is because "[d]ue to the elimination of all factual issues at the dismissal stage of a post[]conviction proceeding, the question is, essentially, a legal one, which requires the reviewing court to make its own independent assessment of the allegations." *Coleman*, 183 Ill. 2d at 388, 701 N.E.2d at 1075.

¶ 18 Here, defendant filed a *pro se* successive petition for postconviction relief. Because the circuit court took no action on the petition within 90 days of the filing of the petition, counsel was appointed. However, defendant later discharged counsel and elected to proceed *pro se*. Defendant then filed a motion for leave to file a successive petition to which he

attached an amended postconviction petition in which he claimed actual innocence. Defendant insists that a series of photographs that were not used at his trial, but were taken at the crime scene and during the victim's autopsy, show his actual innocence. Defendant also claims the crime scene technician "falsely modified" the evidence. The State filed a motion to deny or in the alternative a motion to dismiss. The parties argued the matters before the circuit court. The circuit court heard arguments, examined the photographs tendered by defendant in support of his claims, and took the matter under advisement. Ultimately, the trial court entered an order in which it granted defendant's petition for leave to file an amended postconviction petition, but also granted the State's motion to dismiss defendant's amended petition for postconviction relief.

¶ 19 The trial court rejected defendant's claims that the crime scene technician and a police officer conspired to use false evidence against him and that the State presented perjured testimony on the basis that these were merely conclusory allegations unsupported by affidavits or other legitimate supporting documents. The circuit court also noted that during the hearing on defendant's original postconviction petition, trial counsel testified he was unaware of any perjured testimony at trial. The circuit court specifically stated that it "examined the photographs submitted at trial and which have been in the custody of the circuit clerk's office and the photographs submitted by the People at the hearing on August 15, 2011" and could find "no evidence" that these photographs establish defendant's innocence. The circuit court found most of the photographs from the crime scene and the autopsy "cumulative to the photographs admitted by the State at trial or constitute clearly inadmissible autopsy photographs."

¶ 20 Furthermore, the circuit court found that defendant's claim that he did not see these photographs cannot form the basis for a claim of actual innocence because the photos were a matter of public record and were disclosed to the defense and could have been viewed by

defendant. Likewise, the trial court found that the four affidavits submitted by defendant in support of his amended petition were not newly discovered evidence because the affidavits were from family members and were comprised of claims nearly identical to their trial testimony. As to the rest of defendant's claims, the trial court found them barred pursuant to the doctrines of collateral estoppel, *res judicata*, waiver, and/or forfeiture.

¶ 21 Our review of the record shows that the only "new" documentation or evidence provided by defendant in support of his contention that he is innocent are the color photographs provided by the State. While defendant insists that the circuit court made factual determinations that should not have been decided until after a third stage hearing, the record clearly indicates that the trial court properly considered whether the evidence in support of defendant's petition, accepted as true, was sufficient to make a substantial showing of a constitutional violation. We agree with the State that to hold that a circuit court may not review the evidence attached to a postconviction petition in order to determine whether defendant has made a substantial showing of actual innocence would automatically entitle a defendant to a third stage evidentiary hearing regardless of the nature of the supporting evidence.

¶ 22 In order to constitute newly discovered evidence, each document must not have been available at defendant's original trial and the defendant must not have been able to discover it sooner through diligence. *Simmons*, 388 Ill. App. 3d at 614, 903 N.E.2d at 451. Additionally, the evidence must be material, noncumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004). Here, the record shows that the photographs attached in support of defendant's petition were available to defense counsel as of July 27, 1994, more than a year before defendant's trial. The State was never sanctioned for failing to produce these photographs, nor was the State sanctioned for a discovery violation. Thus, the photographs

were available at the time of defendant's original trial and defendant could have discovered them earlier through due diligence.

¶ 23 Moreover, the photographs attached to defendant's petition are crime scene photos and autopsy photos and are merely cumulative to photographs actually introduced at trial. An autopsy report was introduced at trial which describes the exact location of the victim's gunshot wounds. We agree with the circuit court that these photographs would not likely change the result on retrial. In fact, our own review of the photographs indicates that the photographs are corroborative of defendant's guilt and in no way exonerate him.

¶ 24 Finally, we note that defendant has failed to cite any case law to support his contention that he is automatically entitled to an evidentiary hearing. Our supreme court has said that if allegations contained in the petition are based upon matters of record, no extrinsic evidence may be required and has upheld the dismissal of postconviction petitions when the allegations are contradicted by the record from the original trial proceedings. See *Coleman*, 183 Ill. 2d at 381-82, 701 N.E.2d at 1072. Because defendant claimed the photographs showed actual innocence, the circuit court was required to look at the photographs to determine whether defendant's constitutional rights were violated and see if there was any support in the photographs for defendant's claim of actual innocence. Our *de novo* review shows that the circuit court properly looked at the photographs in order to determine whether defendant made a substantial showing of a constitutional violation and properly found that he did not. Everything necessary to make such a determination was before the circuit court, and no extrinsic evidence was necessary.

¶ 25 Defendant does not challenge the circuit court's conclusion that the remainder of defendant's postconviction claims were barred pursuant to the doctrines of collateral estoppel, *res judicata*, waiver, or forfeiture. After careful consideration, defendant has failed to convince us that he is entitled to a third stage evidentiary hearing. Accordingly, we find that

the trial court did not err in dismissing defendant's amended successive postconviction petition at the second stage.

¶ 26 For the foregoing reasons, the judgment of the circuit court of St. Clair County dismissing defendant's successive postconviction petition is hereby affirmed.

¶ 27 Affirmed.